A

CHEE KUAT FONG & ORS

v.

AMALAN TEPAT SDN BHD & ANOR AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
C [CIVIL APPEAL NOS: W-02-844-99 & W-02-845-99]
28 DECEMBER 2010

CONTRACT: *Construction - Property development - Claim for commission for sale of project - Whether plaintiffs employees of developer*
D *- No mention of percentage in plaintiffs' commission - Whether sales figures published by developer had merit - Whether plaintiffs entitled to commission - Findings of trial judge - Whether there was reason to exercise appellate intervention*

E The first defendant ('the developer') was the developer of a resort cum residential project ('the project'). The second defendant ('Lee') was the property manager cum general manager of the project at the material time and the plaintiffs ('the plaintiffs') were the sales managers, assistant sales managers and sales executives.
F The sales recorded by the developer as at March 1996 was RM198,260,455. Lee claimed that the developer owed him a sum of RM1,586,083.56 being outstanding commission due to him for the sale of the project. The plaintiffs were also claiming for their commission for the sale of the project and directed their claims
G against the developer and in the alternative against Lee in the form of a declaration that Lee was liable to them. The amount claimed varied from one plaintiff to another and was particularised in their statement of claim all of which was based at the rate of 0.35% of the total sales of the project. In its amended defence against both
H Lee and the plaintiffs, the developer averred that the total sales was RM168,174,600 - and not RM198,260,455 - the amount claimed by Lee and the plaintiffs. The developer also denied having any contractual relationship with the plaintiffs as they were Lee's appointees. It was the finding of the learned trial judge that
I the plaintiffs be paid their respective commission by the developer.

The issues that were raised herein were (i) whether the plaintiffs were the employees of the developer; (ii) what was the total amount of sales to base the percentages of commission for the plaintiff and Lee; (iii) what multiplicand to be used by the plaintiffs and Lee to rest their respective commission and (iv) whether, if the plaintiffs were found entitled to their commission, were they to be paid directly by the developer or wait for Lee to be paid first then claim from him later.

Held (dismissing the appeals)
Per Sulong Matjeraie JCA delivering the judgment of the court:

(1) Each of the plaintiffs had a letter of appointment to their respective post issued by the developer. The letters of appointment were signed by Lee and it was within his scope as general manager cum property manager to appoint sales personnel. These letters of appointment were binding on the developer since the task of Lee in appointing sales personnel was within his scope of work as head of the relevant section in the office of the developer. Furthermore, the developer had previously paid salaries and previous commission to these plaintiffs. These were more than sufficient to show that the plaintiffs were the employees of the developer. (para 16)

(2) The plaintiffs were not entitled to their commission unless the purchasers paid the 10% deposit and signed the relevant sale and purchase agreement. The list prepared by the sales manager showed the number of products sold by each of the sales staff but it failed to include particulars of each sale being concluded. Therefore, the learned trial judge's preference in accepting the sales figures published by the developer of RM168,884,300 had merit and was not without basis. (paras 17 & 18)

(3) It was the trial judge's finding that there was no mention of any percentage of the plaintiffs' commission in their letters of appointment. Lee had fixed the plaintiffs' commission to the amount as set out in the letters that he wrote to the plaintiffs, which were received by the plaintiffs. It was also the finding of the trial judge that 8% of sales were done by the sales

staff. There was no reason to disagree with the sound analysis of the trial judge on his finding in respect of the commission due to the sales executives. There was no reason for this court to exercise any appellate intervention on the findings made. (para 24)

(4) Lee should be paid his commission based on 0.8% of RM168,884,300 - after deducting the commission (but before subtracting the advances taken by the plaintiffs and the other staff) of the sales staff involved in the sales of the products at the material time. (para 26)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama ('pemaju') adalah pemaju untuk sebuah pusat peranginan dan projek kediaman ('projek'). Defendan kedua ('Lee') adalah pengurus hartanah dan pengurus besar projek pada masa yang material itu dan plaintif-plaintif ('plaintif-plaintif') adalah pengurus-pengurus jualan, pengurus-pengurus jualan pembantu dan eksekutif jualan. Jualan yang dicatatkan oleh pemaju sehingga Mac 1996 adalah RM198,260,455. Lee mendakwa bahawa pemaju hutangnya RM1,586,083.56 iaitu komisyen yang sepatutnya dibayar kepada Lee untuk jualan projek. Plaintif-plaintif juga menuntut komisyen mereka untuk jualan projek dan membuat dakwaan terhadap pemaju dan secara alternatif terhadap Lee dalam bentuk satu deklarasi yang Lee bertanggungjawab kepada mereka. Jumlah yang dituntut oleh satu plaintiff berlainan daripada apa yang dituntut oleh plaintif lain dan diperincikan di dalam penyataan tuntutan berdasarkan kadar 0.35% dari jumlah jualan keseluruhan projek. Di dalam pembelaan terpinda pemaju terhadap kedua-dua Lee dan plaintif-plaintif, pemaju telah menegaskan bahawa jumlah jualan adalah RM168,174,600 - dan bukan RM198,260,455 - jumlah yang dituntut oleh Lee dan plaintif-plaintif. Pemaju juga telah menafikan perhubungan kontraktual di antara pemaju dan plaintiff-plaintiff kerana plaintif-plaintif adalah orang-orang yang dilantik oleh Lee. Ia adalah dapatan hakim bicara bahawa plaintif-plaintif dibayar komisyen masing-masing oleh pemaju. Isu-isu yang timbul di sini adalah (i) sama ada plaintif-plaintif adalah pekerja-pekerja pemaju; (ii) apa jumlah keseluruhan jualan untuk

berdasarkan peratusan komisyen bagi plaintif-plaintif dan Lee; (iii) apa multiplicand yang patut digunakan oleh plaintif-plaintif dan Lee untuk menentukan komisyen masing-masing dan (iv) sama ada jika plaintif-plaintif didapati berhak ke atas komisyen adakah mereka dibayar terus oleh pemaju atau terpaksa tunggu untuk Lee dibayar dulu dan tuntut dari Lee selepas itu.

Diputuskan (menolak rayuan-rayuan)
Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Setiap plaintif diberi surat perlantikan ke jawatan masing-masing yang dikeluarkan oleh pemaju. Surat-surat perlantikan ditandatangani oleh Lee dan ia adalah dalam skopnya sebagai pengurus besar dan pengurus hartanah untuk melantik kakitangan jualan. Surat-surat perlantikan itu adalah terikat kepada pemaju kerana tugas Lee melantik kakitangan jualan dalam skop pekerjaannya sebagai ketua bahagian relevan dalam pejabat pemaju. Tambahan pula, pemaju telah sebelum ini membayar gaji dan komisyen kepada plaintif-plaintif. Ini lebih daripada mencukupi menunjukkan plaintif-plaintif ialah pekerja-pekerja pemaju.

(2) Plaintif-plaintif tidak mempunyai hak ke atas komisyen mereka melainkan pembeli-pembeli membayar deposit 10% dan menandatangani perjanjian jual beli yang relevan. Senarai yang disediakan oleh pengurus jualan menunjukkan produk-produk yang dijual oleh setiap pekerja jualan tetapi gagal memasukkan butir-butir setiap jualan yang dimuktamadkan. Oleh itu, kecenderungan yang arif hakim menerima angka jualan RM168,884,300 yang diterbit pemaju mempunyai merit dan bukan tanpa asas.

(3) Ia adalah dapatan hakim bicara bahawa tidak terdapat sebutan mengenai peratusan komisyen plaintif-plaintif di dalam surat perlantikan mereka. Lee telah menetapkan komisyen plaintif-plaintif kepada jumlah yang telah disediakan di dalam surat-surat yang telah dihantar Lee ke plaintif-plaintif, dan telah diterima oleh plaintif-plaintif. Ia juga dapatan hakim bicara bahawa 8% dari jualan dibuat oleh pekerja-pekerja jualan. Tiada sebab timbul untuk tidak bersetuju dengan analisis yang baik hakim bicara atas dapatannya mengenai komisyen yang perlu dibayar kepada eksekutif-eksekutif jualan. Tiada sebab untuk mahkamah ini melaksanakan campurtangan rayuan ke atas dapatan-dapatan yang dibuat.

A **(4)** Lee harus dibayar komisyen berdasarkan 0.8% dari RM168,884,300 - selepas menolak komisyen (tetapi sebelum menolak pendahuluan yang diambil oleh plaintif-plaintif dan pekerja yang lain) pekerja-pekerja jualan yang terlibat di dalam jualan produk pada masa material itu.

B

[Perintah seharusnya.]

(Civil Appeal No: W-02-844-99)
For the appellants - KL Wong (Shazwani Abd Karim with him); M/s KL Wong
C *For the 1st respondents - Mahendra Mahason; M/s RY Nanthan & Partners*
For the 2nd respondents - Jadadish Chandra; M/s Arbain & Co

(Civil Appeal No: W-02-845-99)
For the appellants - Jadadish Chandra; M/s Arbain & Co
For the 1st respondents - Mahendra Mahason; M/s RY Nanthan & Partners
D *For the 2nd - 7th respondents - KL Wong (Shazwani Abd Karim with him); M/s KL Wong*

Reported by Suhainah Wahiduddin

E

JUDGMENT

Sulong Matjeraie JCA:

F **[1]** Following the decision at the court below to consolidate and to try the two cases together, the parties hereto agreed that both cases Civil Appeal No. W-02-844-1999 and Civil Appeal No. W-02-845-1999 shall be heard together in this court.

Preamble

G

[2] For convenience and ease of reference and identification, the six appellants in W-02-844-1999 shall, collectively, be referred to as 'the plaintiffs' as they were referred to in the court below and likewise the respondents Amalan Tepat Sdn Bhd and Lee Wai
H Yen shall be referred to as '1st defendant' and '2nd defendant' respectively.

[3] In respect of Civil Appeal No: W-02-845-1999, the 1st respondent, Amalan Tepat Sdn Bhd shall also be referred to as
I '1st defendant'. Likewise the 2nd to 7th respondents shall be referred to as 'the plaintiffs'.

Brief Facts

[4] The 1st defendant in Civil Appeal No. W-02-845-1999 is also the defendant that develops a resort cum residential project in Malacca known as "A Famosa Golf Resort" ('the project') in Civil Appeal No. W-02-844-1999. For avoidance of complication the 1st defendant shall hereinafter be referred to as 'the developer'.

[5] The 2nd defendant in Civil Appeal No. W-02-844-1999 is also the plaintiff in Civil Appeal No. W-02-845-1999 and is known as Lee Wai Yen ('Lee'). He was the property manager cum general manager of the project at the material time.

[6] The plaintiffs in Civil Appeal No. W-02-844-1999 were, at the material time, sales managers, assistant sales managers and sales executives respectively in respect of the project and shall hereinafter be referred to collectively as 'the plaintiffs'.

[7] Lee was appointed to the post of property manager cum general manager of the project by a letter of appointment dated 1 June 1994. The relevant clause of the terms and conditions of the said letter is cl. 2 which stipulates as follows:

> Incentives and commission depending on the total sales performance of the month. Total sales (RM$) x. 08 = (RM$) will be given to you as commission shares between the sales and marketing staff.

[8] The sales recorded by the developer as at March 1996 was RM198,260,455. It is based on cl. 2 above that Lee now claims that the developer owes him a sum of RM1,586,083.56 being outstanding commission due to him for the sale of the project.

[9] Likewise, the plaintiffs are claiming for their commission for the sale of the project. They direct their claims against the developer and in the alternative against Lee in the form of a declaration that Lee is liable to them. The amount claimed varies from one plaintiff to another and is particularised in their statement of claim all of which is based at the rate of 0.35% of the total sales of the project at the material time.

[10] In its amended defence against both Lee and the plaintiffs, the developer averred that the total sales was RM168,174,600 and not RM198,260,455 the amount claimed by Lee and the plaintiffs. The developer also denies having any contractual relationship with the plaintiffs as they were Lee's appointees.

[11] Lee, in his defence to the claim by the plaintiffs averred that their claim was premature and that the commission should be as set out at pp. 342-344 Appeal Record. Lee testified personally and called another witness Ms. Tan Mooi Siew.

[12] The plaintiffs testified separately by separate witness statements. The developer called its accountant, Mr. Tan Kok Hua as its witness.

Findings Of The Learned Trial Judge At The High Court

[13] It is the finding of the learned trial judge that the plaintiffs shall be paid their respective commission by the developer based on the following:

(i) For the 1st and 2nd plaintiffs 20% overriding commission on what the sales executives receive;

(ii) For the 3rd plaintiff 15% overriding commission on what the sales executives receive;

(iii) For the 4th to 6th plaintiffs they shall be paid their commissions based on the formula set out in pp. 91 & 93 of Enclosure 52;

(iv) Payments for the plaintiffs should be set-off against the advances received by the plaintiffs;

(v) Lee shall be paid his commission based on 0.8% of the RM168,884,300 after deducting the commission (but before subtracting the advances taken by the plaintiffs and other staff) of the sales staff involved in the sales of the project at the material time;

(vi) There shall be interest of 8% per annum on all sums due to the claimants from date of this judgment to date of realisation and to be paid by the developer; and

(vii) There shall be no costs awarded to any party.

Issues

[14] On the analysis made by the learned trial judge in relation to this instant case, we agree with his reasoning that there are four issues and these are as follows:

(a) Whether the plaintiffs are employees of the developer;

(b) What is the total amount of sales to base the percentages of commission for the plaintiffs and Lee; A

(c) What multiplicand to be used by the plaintiffs and Lee to rest their respective commission; and

(d) If the plaintiffs are found entitled to their commission are they to be paid directly by the developer or do they have to wait for Lee to be paid first then to claim from him later. B

[15] On (a) above, we see no reason to disagree with the finding of the learned trial judge that each of the plaintiffs had a letter of appointment to their respective post issued by the developer: hence they are employees of the developer. C

[16] We agree further that the letters of appointment were signed by Lee who was the general manager cum property manager and it was within his scope of his work to appoint such sales personnel. These letters of appointment are binding on the developer since the task of Lee in appointing sales personnel was within his scope of work as head of the relevant section in the office of the developer. Furthermore, it is the finding of the learned trial judge that the developer had previously paid salaries and previous commission to these plaintiffs. We agree with the learned trial judge that these are more than sufficient to show that the plaintiffs were the employees of the developer. D E

[17] On (b) which concerns the issue to determine what is the actual total sales figure of the products of the sales staff at the material time, we agree with the finding of the learned trial judge in admitting the evidence of the plaintiffs that they are not entitled to their commission unless the purchasers paid the 10% deposit and signed the relevant sale and purchase agreement. F G

[18] It would appear to us that the list prepared by the sales manager show the number of products sold by each of the sales staff. But the list failed to include particulars of each sale being concluded. Therefore it is our view that the learned trial judge's preference in accepting the sales figures published by the developer is acceptable because they are based on entries which reflect an accurate picture in determining what each sales staff is entitled to receive. H I

[19] Therefore the learned trial judge's acceptance of the final total sales figure published by the developer of RM168,884,300 has merit and not without basis. We agree with his finding.

[20] On (c) the issue concerns the multiplicand. It is the finding of the learned trial judge that 8% of sales were done by the sales staff. But in respect of the plaintiffs, despite the fact that they based their claims on 0.35% of the total sales, it is his finding that there is no mention of any percentage of their commission in their letters of appointment which stipulates:

> Your commission will be set by the company depending on the target achieved.

[21] Lee subsequently fixed the plaintiffs' commission to the amount as set out in the letters that he wrote to the plaintiffs, which the plaintiffs denied having been received.

[22] The learned trial judge however made a finding that these documents were actually received by the plaintiffs when he said at p. 26 Appeal Record as follows:

> I have considered this matter carefully, and is still of the opinion that these letters setting out the commission for the sales executives were not fabrications of Lee but documents actually sent by Lee and received by all the sales staff in employment of the Developer then. Further I hold the view that the sales staff had accepted the amounts of commission stated therein. My main reasons for this conclusion are as follows: If the sales staff did not accept the amount of commission they would have left the service of the Developer. Instead they all remained and continued to sell more Products. Though the Plaintiffs explained that they pursued this course for fear of losing their entitlement to commission earned earlier, but not disbursed to them as yet, I find this improbable. What the Plaintiffs had secured at that time was potential purchasers who made the bookings. This did not entitle them to any commission. Further, if they were unhappy over the amounts of their commission they could have complained to the directors of the Developer. I do not believe that this was done. In addition, there is the evidence of PW2 who testified that these letters setting out the commission were given to all the sales staff, of whom she was one. Based on the aforesaid, I therefore find the commission due to the sales executives is as set out in pages 91 and 93 of enclosure 52.

[23] We have no reason to disagree with the sound analysis of the learned trial judge and agree fully with him on his finding in respect of the commission due to the sales executives.

[24] We further concur with the other findings of facts by the learned trial judge on the entitlement of overriding commission in respect of the 1st, 2nd, 3rd, 4th, 5th and 6th plaintiffs. The law on this is very clear. Unless there is obvious error in the reasoning to the finding of facts made by the learned trial judge, the appellate court shall be very slow to interfere. As such there is no reason for us to exercise any appellate intervention on the findings made.

[25] Similarly, in respect of Lee's protest to any set-off, we fully agree with the learned trial judge's decision in refusing the request for set-off by the developer when he ruled as follows:

> In respect of Lee there is an exhibit D1 that reveals an advancement of RM50,000.00 paid to him by the Developer. Lee protested to any set-off on the grounds that the Developer did not plead this, and his testimony never admitted this sum, nor was there any question put to him on this subject by the Developer's counsel. I am in full agreement with his argument. The Developer's counsel during cross examination of Lee never raised this issue and it is unfair to deprive this party a chance to explain or deny the contents of this document. This request for a set-off by the Developer must therefor be refused.

[26] On the final point (d), we fully agree with the finding made by the learned trial judge that Lee shall be paid his commission based on 0.8% of RM168,884,300 after deducting the commission (but before subtracting the advances taken by the plaintiffs and the other staff) of the sales staff involved in the sales of the products at the material time.

[27] In view of the above, we unanimously dismiss both appeals except on interest and costs. With regard to interest we vary the learned trial judge's order that the 8% interest shall run from the date of filing of the writ. With regard to costs we also vary the learned trial judge's order by substituting that costs be awarded to the plaintiffs.

[28] In view of the outcome of this appeal, there shall be no order as to costs here and the deposits to be refunded to the respective plaintiffs.